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R.S., Appellant)	
)	
and)	Docket No. 20-0177
)	Issued: September 3, 2021
)	
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Washington, DC,)	
Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On October 30, 2019 appellant filed a timely appeal from two May 16, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,500.86, for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014, because he improperly received wage-loss compensation at an augmented compensation rate; (2) whether he received an overpayment of compensation in the amount of

² The Board notes that, following the May 16, 2019 decisions, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

\$67,945.28, for the period June 28, 2013 through September 16, 2017, because he improperly received an attendant allowance; (3) whether OWCP properly found appellant at fault in the creation of the \$1,500.86 and \$67,945.28 overpayments, thereby precluding waiver of recovery of the overpayments; and (4) whether it properly required recovery of the \$1,500.86 and \$67,945.28 overpayments by deducting \$254.93 and \$764.81, respectively, from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

OWCP accepted that on November 14, 1973 appellant, then a 46-year-old engineer, sustained a head contusion, vitreous detachment of the left eye, and cervical, lumbosacral, and right ankle strains due to a motor vehicle accident which occurred while in the performance of duty. It also accepted that he sustained a head contusion, and cervical, lumbosacral, and right ankle sprains due to a December 14, 1983 fall at work. Appellant last worked for the employing establishment on December 14, 1983 and OWCP paid him wage-loss compensation for disability from work on the supplemental and periodic rolls.

The case record reflects that on January 15, 1998 OWCP authorized appellant to receive an attendant allowance at a minimum rate of \$1,384.62 every 28 days in order to compensate for his wife's attending to his daily needs.

The case record contains several Form EN1032 documents, in which OWCP informed him that the basic rate of compensation was 66 2/3 percent of the applicable pay rate if he had no eligible dependents within the meaning of FECA. OWCP further noted that compensation was payable at 75 percent of the applicable pay rate if he had one or more eligible dependents. It informed appellant that he could claim additional compensation for a dependent if he had a spouse who was a member of his household or, under specified circumstances, a child or parent dependent upon his support. He had been paid at the augmented rate as his wife was a dependent. Appellant completed those forms between January 10, 1986 and December 13, 2013.

In a Form EN1032, signed on December 13, 2013, appellant advised OWCP that his wife had passed away on June 27, 2013 and he, therefore, no longer had a dependent for benefit rate purposes.³

In an April 4, 2019 notice, OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$1,500.86, for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014, because he received

³ On June 29, 2013 OWCP paid appellant \$5,384.34 in compensation for the period covering June 2 through 29, 2013. On July 27, 2013 it paid him \$5,384.34 in compensation for the period covering June 30 through July 27, 2013. On February 8, 2014 OWCP paid appellant \$5,374.66 in compensation for the period January 12 through February 8, 2014.

augmented compensation at the 75 percent pay rate to which he was not entitled.⁴ It provided a calculation of the overpayment, noting that appellant had a weekly pay rate of \$4,400.00 and that proper application of the 66 2/3 pay rate meant that he was entitled to \$4,191.43 for the period June 28 through July 27, 2013 and \$7,840.86 for the period January 12 through March 8, 2014, with the two figures totaling \$12,032.29. However, appellant actually received \$4,714.29 and \$8,818.86 for those respective periods, for a total of \$13,533.15. OWCP found a \$1,500.86 overpayment by subtracting \$12,032.29 from \$13,533.15.⁵ It also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments that he knew, or reasonably should have known, to have been incorrect. OWCP advised him that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed appellant that he could submit additional evidence in writing or at pre-recoupment hearing, but that a pre-recoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that he complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days to be considered regarding the questions of waiver and method of recovery of the overpayment.

In a separate April 4, 2019 notice, OWCP advised appellant of its preliminary determination that he received a \$67,945.28 overpayment of compensation for the period June 28, 2013 through September 16, 2017 because he received an attendant allowance every 28 days during this period for which he did not qualify following the death of his wife. It indicated that he received \$67,945.28 in attendant allowance compensation for the period June 28, 2013 through September 16, 2017, but was not entitled to receive any portion of this amount because the entire payment period occurred after his wife's death.⁶ OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments that he knew, or reasonably should have known, to have been incorrect. It advised appellant regarding his options for challenging the fact, amount, or finding of fault, and for requesting waiver of

⁴ In a June 5, 2018 notice, OWCP had previously advised appellant of its preliminary determination that he received a \$58,481.20 overpayment of compensation for the period June 27, 2013 through September 16, 2017. In response to its request, appellant submitted an overpayment recovery questionnaire (Form OWCP-20), signed on July 2, 2018, in which he reported monthly income of \$8,206.00, monthly expenses of \$2,900.00, and assets of \$21,000.00. A telephonic pre-recoupment hearing was held on November 16, 2018 before a representative of OWCP's Branch of Hearings and Review and, by decision dated February 14, 2019, OWCP's hearing representative advised that further development was required (including a more detailed explanation of the manner of the creation of the overpayment) before a final overpayment decision could be issued.

⁵ The case record contains payroll records and an April 4, 2019 manual adjustment form detailing the calculation of the \$1,500.86 overpayment for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014. The period June 28 through July 27, 2013 was covered by two electronic bank deposits. The first deposit was made on June 29, 2013 and covered the period June 2 through 29, 2013, thereby coinciding with the overpayment period for the last two days covered by the deposit (June 28 and 29, 2013). The second deposit was made on July 27, 2013 and covered the period June 30 through July 27, 2013, thereby coinciding with the overpayment period for all the days covered by the deposit. Appellant had returned six bank deposits covering the period July 28, 2013 through January 11, 2014 and was paid compensation for that period.

⁶ The case record contains payroll records and an April 4, 2019 manual adjustment form detailing the calculation of the \$67,945.28 overpayment. The documents show that appellant received an attendant allowance of \$1,384.62 every 28 days. The first electronic bank deposit which contained a prohibited portion of the \$1,384.62 attendant allowance was made on June 29, 2013 and covered the period June 2 through 29, 2013, thereby coinciding with the overpayment period for the last two days covered by the deposit (June 28 and 29, 2013). The second electronic bank deposit which contained a prohibited \$1,384.62 attendant allowance was made on July 27, 2013 and covered the period June 30 through July 27, 2013, thereby coinciding with the overpayment period for all the days covered by the deposit.

recovery of the overpayment. OWCP again requested that he complete and return a Form OWCP-20 within 30 days.

No response was received.

By decision dated May 16, 2019, OWCP found that appellant received an overpayment of compensation in the amount of \$1,500.86 for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014 because he improperly received wage-loss compensation at an augmented compensation rate. It also found him at fault in the creation of the \$1,500.86 overpayment, thereby precluding waiver of recovery of the overpayment. OWCP found appellant at fault in the creation of the \$1,500.86 overpayment because he neglected to provide notification within 90 days of the change in his dependency status and he knowingly continued to receive compensation at a pay rate to which he was not entitled. It denied waiver of recovery of the overpayment as he did not respond to its April 4, 2019 request for financial information and determined that recovery of the \$1,500.86 overpayment would be made by deducting \$254.93 from his continuing compensation payments every 28 days.

By separate decision dated May 16, 2019, OWCP found that appellant received an overpayment of compensation in the amount of \$67,945.28 for the period June 28, 2013 to September 16, 2017, because he improperly received an attendant allowance. It further determined that he was at fault in the creation of the \$67,945.28 overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted that appellant's wife had been authorized since 1998 to provide attendant services and appellant should have reasonably known that the payments he received following her death were incorrect and that he was no longer entitled to receive the attendant allowance. It determined that recovery of the \$67,945.28 overpayment would be made by deducting \$764.81 from appellant's continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁷ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.”⁸

If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 percent of his or her monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.⁹ If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *See O.R.*, 59 ECAB 432, 436 (2008). *See also* 5 U.S.C. §§ 8105(a) and 8110(b).

disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,500.86 for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014 because he improperly received wage-loss compensation at an augmented compensation rate.

For the periods June 28 through July 27, 2013 and January 12 through March 8, 2014, appellant received augmented compensation at the 75 percent pay rate (for a claimant with at least one dependent) to which he was not entitled because his wife had passed away on June 27, 2013 and he no longer had a dependent within the meaning of FECA.¹¹ OWCP provided a calculation of the overpayment, noting that appellant had a weekly pay rate of \$4,400.00 and that proper application of the 66 2/3 pay rate meant that he was entitled to \$4,191.43 for the period June 28 through July 27, 2013 and \$7,840.86 for the period January 12 through March 8, 2014, with the two figures, totaling \$12,032.29. However, appellant actually received \$4,714.29 and \$8,818.86 for those respective periods, totaling \$13,533.15; therefore the \$1,500.86 overpayment was derived by subtracting \$12,032.29 from \$13,533.15. For these reasons, the Board finds that appellant received a \$1,500.86 overpayment of compensation for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014.

LEGAL PRECEDENT-- ISSUE 2

Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.¹² Section 8111 of FECA provides that the Secretary of Labor may pay an employee who has been awarded compensation an additional sum of not more than \$1,500.00 a month, as the Secretary considers necessary, when the Secretary finds that the service of an attendant is necessary constantly because the employee is totally blind or has lost the use of both hands or both feet or is paralyzed and unable to walk or because of other disability resulting from the injury making him or her so helpless as to require constant attendance.¹³ As noted above, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.”¹⁴

¹⁰ See *C.F.*, Docket No. 18-1344 (issued August 22, 2019); *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

¹¹ See *supra* notes 8 and 9.

¹² 5 U.S.C. § 8103; see *Dona M. Mahurin*, 54 ECAB 309 (2003).

¹³ 5 U.S.C. § 8111. See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.21 (September 2010).

¹⁴ See *supra* note 7.

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$67,945.28 for the period June 28, 2013 through September 16, 2017 because he improperly received an attendant allowance.

On January 15, 1998 OWCP authorized appellant to receive an attendant allowance at a minimum rate of \$1,384.62 every four weeks in order to compensate for his wife's attending to his daily needs.¹⁵ For the period June 28, 2013 through September 16, 2017, appellant received an attendant allowance every 28 days during this period for which he did not qualify because his wife, who had served as his attendant, had died on June 27, 2013. The case record contains documents showing that appellant received \$67,945.28 in attendant allowance compensation for the period June 28, 2013 through September 16, 2017, but was not entitled to receive any portion of this amount because the entire payment period fell after his wife's death. For these reasons, the Board finds that appellant received a \$67,945.28 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁶ provides that [a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience. Section 10.433 of OWCP's implementing regulations¹⁷ provides that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first or second time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁸ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the

¹⁵ See *supra* notes 11 and 12.

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ 20 C.F.R. § 10.433.

¹⁸ See *M.J.*, Docket No. 19-1665 (issued July 29, 2020); *Tammy Craven*, 57 ECAB 689 (2006).

payments subsequently deposited.¹⁹ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly found appellant at fault in the creation of the \$1,500.86 overpayment for the period June 28 through July 27, 2013, but properly found him at fault for the period January 12 through March 8, 2014.

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to have been incorrect. The Board finds, however, that OWCP failed to establish that, at the time appellant accepted the initial two payments of compensation following June 27, 2013, the date of his wife's death, he knew or should have known the payments to have been incorrect.

As noted above, OWCP properly found that appellant received an overpayment of compensation in the amount of \$1,500.86 for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014 because he improperly received wage-loss compensation at an augmented compensation pay rate after his wife's death. The period June 28 through July 27, 2013 was covered by two electronic bank deposits. The first deposit was made on June 29, 2013 and covered the period June 2 through 29, 2013, thereby coinciding with the overpayment period for the last two days covered by the deposit (June 28 and 29, 2013). The second deposit was made on July 27, 2013 and covered the period June 30 through July 27, 2013, thereby coinciding with the overpayment period for all the days covered by the deposit.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.²¹ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.²² Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.²³ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.²⁴ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment through direct deposit until such time as a reasonable person would have been aware

¹⁹ See *J.W.*, Docket No. 10-1271 (issued February 3, 2011); see also *Karen Dixon*, 56 ECAB 145 (2004).

²⁰ *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

²¹ See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²² See *M.J.*, *supra* note 18; see also *George A. Hirsch*, 47 ECAB 520 (1996).

²³ *Id.*

²⁴ *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²⁵

Appellant received compensation by direct deposit payments every 28 days. With respect to the \$1,500.86 overpayment, the evidence of record does not establish that, as of the first and second direct deposits of compensation after June 27, 2013, he knew or reasonably should have known that he was accepting direct deposits to which he was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he received direct deposits from OWCP on June 29 and July 27, 2013, covering the period of the overpayment from June 28 through July 27, 2013, that the payments were incorrect, or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment. Therefore, he is not at fault in the acceptance of the two direct deposit covering the period of the overpayment from June 28 through July 27, 2013.

In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²⁶ By the time of the February 8, 2014 payment covering the period January 12 to February 8, 2014, appellant knew or should have known that he was not entitled to receive wage-loss compensation at the augmented pay rate.²⁷

Accordingly, the Board will affirm the finding of fault for the remaining period of \$1,500.86 overpayment, *i.e.*, January 12 through March 8, 2014.

The Board further finds that OWCP improperly found appellant at fault in the creation of the \$67,945.28 overpayment for the period June 28 through July 27, 2013, but properly found him at fault for the period July 28, 2013 through September 16, 2017.

As noted above, appellant received an overpayment of compensation in the amount of \$67,945.28 for the period June 28, 2013 through September 16, 2017 because he improperly received an attendant allowance (\$1,384.62 every 28 days) after his wife died on June 27, 2013. The first electronic bank deposit which included a prohibited portion of the \$1,384.62 attendant allowance was made on June 29, 2013 and covered the period June 2 through 29, 2013, thereby coinciding with the overpayment period for the last two days covered by the deposit (June 28 and 29, 2013). The second electronic bank deposit which included a prohibited \$1,384.62 attendant allowance was made on July 27, 2013 and covered the period June 30 through July 27, 2013, thereby coinciding with the overpayment period for all the days covered by the deposit.

With respect to the \$67,945.28 overpayment, the evidence of record does not establish that, as of the first and second direct deposits of compensation after June 27, 2013, appellant knew or reasonably should have known that he was accepting direct deposits, including compensation for

²⁵ See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

²⁶ See *supra* note 18.

²⁷ See *supra* note 24.

an attendant allowance, to which he was not entitled. There is no documentation or other evidence to demonstrate that he had clear knowledge at the time he received direct deposits from OWCP on June 29 and July 27, 2013, covering the period of the overpayment from June 28 through July 27, 2013, that the payments were incorrect, or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment. Therefore, appellant is not at fault in the acceptance of the two direct deposits covering the period of the overpayment from June 28 through July 27, 2013.²⁸

As noted above, in cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²⁹ By the time of the third payment dated August 24, 2013, given the passage of time, appellant knew or should have known that he was not entitled to receive an attendant allowance after the June 27, 2103 death of his wife.³⁰

Accordingly, the Board will affirm the finding of fault for the remaining period of \$67,945.28 overpayment, *i.e.*, July 28, 2013 through September 16, 2017.

With respect to both the \$1,500.86 and \$67,945.28 overpayments, this case is not in posture for decision regarding the issue of waiver of recovery of the overpayments created by the June 29 and July 27, 2013 direct deposits covering the period of each overpayment from June 28 through July 27, 2013. The case must therefore be remanded for OWCP in order to determine whether appellant is entitled to waiver of recovery for these direct deposits of compensation covering the period of each overpayment from June 28 through July 27, 2013.³¹ As appellant's eligibility for waiver for a portion of the overpayments cannot yet be determined, on remand OWCP shall grant appellant an opportunity to submit an updated Form OWCP-20 and consider the relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,500.86 for the periods June 28 through July 27, 2013 and January 12 through March 8, 2014 because he improperly received wage-loss compensation at an augmented compensation rate, and an overpayment in the amount of \$67,945.28 for the period June 28, 2013 to September 16, 2017 because he improperly received an attendant allowance. The Board finds that OWCP improperly found appellant at fault in the creation of the \$1,500.86 overpayment for the period June 28 through July 27, 2013, but properly found him at fault for the period January 12 through March 8, 2014. The Board finds that OWCP improperly found appellant at fault in the creation of the \$67,945.28

²⁸ *Id.*

²⁹ *See J.W.*, Docket No. 10-1271 (issued February 3, 2011); *see also Karen Dixon*, 56 ECAB 145 (2004).

³⁰ *Id.*

³¹ In light of the Board's disposition of Issue 3, it is premature to address Issue 4.

overpayment for the period June 28 through July 27, 2013, but properly found him at fault for the period July 28, 2013 through September 16, 2017.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2019 decisions of the Office of Workers' Compensation Programs are affirmed in part, and set aside in part. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 3, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board